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No. 351

In the Supreme Court of the United States

OCTOBER TERM, 1948

COSMOPOLITAN SHIPPING COMPANY, INC.,
PETITIONER

v.

ROBERT A. MCALLISTER

PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES CIRCUIT COURT OF APPEALS FOR THE SECOND CIRCUIT

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The Solicitor General, on behalf of Cosmopolitan Shipping Company, Inc., a general agent of the former War Shipping Administration,[1] prays that a writ of certiorari issue to review the judgment of the United States Court of Appeals for the Second Circuit entered in the above-entitled case on July 23, 1948

[1] By Section 202 of the Naval Appropriation Act for 1947 (c. 543, 60 Stat. 481, 501), the War Shipping Administration was abolished and its duties transferred to the United States Maritime Commission. The Solicitor General appears for petitioner because, in accordance with the wartime general agency agreement between petitioner and the War Shipping Administration, the United States is obligated for any recovery effected to the extent not covered by insurance (W.S.A. Form GAA 4-4-42 (R. 608)). On the standard form insurance which is obtained, the United States in effect assumes the reinsurance of the most substantial part of all losses. House Merchant Marine and Fisheries Committee, Doc. No. 4, *Compilation of Standard Contract Forms of the War Shipping Administration*, p. 847. The defense of such actions is assumed by the Department of Justice whenever it appears to be required by the public importance of the question involved.

OPINION BELOW

The opinion of the United States Court of Appeals for the Second Circuit (R. 638) is reported at 169 F. 2d 4.

JURISDICTION

The judgment of the Court of Appeals was entered July 23, 1948 (R. 645). The jurisdiction of this Court is invoked under 28 U.S.C. 1254 (1).

QUESTIONS PRESENTED

Whether in a case arising after the effective date of the War Shipping Administration Clarification Act of March 24, 1943, petitioner, a private steamship operator employed by the United States, as its agent and not as an independent contractor, to manage and conduct the accounting and certain other shore-side business operations of government vessels, which the United States, as operating owner in possession and control, manned, navigated, and physically managed by government employed masters and crews, is liable for the negligence of the Government's shipmaster and other shore-side agents in exposing respondent, a civil service employee of the Government, to infection, and thereafter failing to furnish him with proper medical care, where such negligence occurred after the effective date of the Clarification Act.

STATUTES AND REGULATIONS INVOLVED

The statutes and regulations involved, *i.e.* the War Shipping Administration (Clarification) Act (57 Stat. 45; 50 U. S. C. App. 1291), the Jones Act (41 Stat. 1007; 46 U. S. C. 688), the Federal

Employers' Liability Act (35 Stat. 65, as amended; 45 U. S. C. 51) and R. S. 1753 (5 U. S. C. 631), together with the applicable Civil Service Rules and War Shipping Administration Operations Regulations, are set forth in the Appendix, *infra*, pp. 19-25.

STATEMENT

The S. S. *Edward B. Haines* was a vessel built and owned by the United States and operated by the War Shipping Administration (R. 358). Petitioner as ship's husband or general agent under the wartime standard form of service agreement GAA 4-4-42 (R. 358-359, Ex. G, R. 608)[2] was employed by the United States to manage and conduct the accounting and certain other shoreside business operations of the *Haines* and other government-operated vessels "in accordance with such directions, orders, or regulations" as the Government might prescribe. Respondent was procured by petitioner from the union for employment by the master of the *Haines* on behalf of the United States in accordance with the requirements of Article 3 A (d) of the agency agreement (R. 104-109, 477-478, 489, 85).[3] The shipping

[2] The form of agreement was in all essential respects the same as that which was before the court in *Caldarola* v. *Eckert*, 332 U. S. 155. It was authorized by General Order 21 of the War Shipping Administration issued September 22, 1942, 7 F. R. 7561, and also appears in full text in 46 C. F. R. Cum. Supp. § 306.44.

[3] "The General Agent shall procure the Master of the vessels operated hereunder, subject to the approval of the United States. The Master shall be an agent and employee of the United States, and shall have and exercise full control, responsibility and authority with respect to the navigation and

articles between the master and crew, which respondent signed in the capacity of second assistant engineer, bore the endorsement "YOU ARE BEING EMPLOYED BY THE UNITED STATES" and made petitioner's relation to the vessel clear by specific reference to "Cosmopolitan Shipping Co., Inc., as General Agent for the United States" (R. 360-362; Ex. A, R. 606). Respondent, by virtue of this employment on a government-operated vessel, was technically an unclassified civil service employee. Civil Service Rules, Schedule A, Sec. xxi (1).[4]

From the time the *Haines* left New York with a cargo for the Army at Shanghai until her return to the United States petitioner had no further control over her, and in China, where the events giving rise to respondent's claim occurred, petitioner was not represented and the vessel's shoreside business was attended to exclusively by employees of the Army and the War Shipping Administra-

management of the vessel. The General Agent shall procure and make available to the Master for engagement by him the officers and men required by him to fill the complement of the vessel. Such officers and men shall be procured by the General Agent through the usual channels and in accordance with the customary practices of commercial operators and upon the terms and conditions prevailing in the particular service or services in which the vessels are to be operated from time to time. The officers and members of the crew shall be subject only to the orders of the Master. All such persons shall be paid in the customary manner with funds provided by the United States hereunder."

[4] 5 C. F. R., 1943 Cum. Supp., p. 1488, sec. 50.2[1] (Ex. O. 9004, 7 F. R. 2, 8; Ex. O. 9054, 7 F. R. 837). See also War Shipping Administration Operations Regulations No. 12, Supplement 1, *infra*, pp. 23-25.

tion (R. 59, 371-372, 376). Upon the vessel's arrival at Shanghai on September 26, 1945, the master posted notices that an epidemic of polio as well as other diseases prevailed and directed the crew when ashore to eat only in special places and not to mix with the Chinese. But various natives who came aboard at Shanghai to stevedore the vessel, and as passengers on trips to Hongkong and Tsing Tao, were permitted to use the common toilet facilities and drinking fountain of the vessel (R. 33-39, 59-61, 68-69, 331-334). Moreover, the Chinese cooks for the Chinese passengers were allowed to use the same cooking utensils and handle the same food as the vessel's other cooks (R. 38-39). Respondent began to feel ill on November 11, 1945, and the master and officers of the vessel had reason to believe as early as November 22, 1945, that he might have polio, but they did nothing to procure proper diagnosis or treatment by physicians for respondent while the vessel was at Shanghai from November 11 to 23, 1945 (R. 40-50, 70-73, 96-98, 112, 116, 120-127, 328-330, 335). It was only after the vessel docked at Tsing Tao on November 28, 1945, that arrangements were made to transfer respondent to a hospital ashore on November 30, where diagnosis and treatment were begun (R. 60, 80-82, 84, 131). Respondent's medical experts testified that he could have been infected from the Chinese and that he could have been prejudiced by the delay in treatment.

Respondent's action was alleged in two separate counts, the first under the Jones Act (*infra*, p. 21),

predicated on the alleged negligence of his fellow officers, who had been employed by the United States to man, navigate and physically manage a War Shipping Administration owned and operated vessel, in failing to protect him from poliomyelitis infection and in not giving him prompt and adequate treatment after infection occurred. The second count was for maintenance and cure under the general maritime law. His suit was not brought against the United States under the Suits in Admiralty Act, 41 Stat. 525, 46 U.S.C. 741 *et seq.* Instead, he proceeded, at law, against petitioner, the ship's husband or general agent employed by the United States to attend to the accounting and certain other shoreside business operations of the vessel (R. 3-6).[3] After a trial lasting six days, the district court left the case to the jury under instructions which authorized a verdict against

[3] Respondent's right to bring the statutory action under the Jones Act against petitioner is not here questioned. The Jones Act refers only to "any seaman who shall suffer personal injury in the course of his employment" (46 U.S.C. 688) and does not itself require a commonlaw employer-employee relationship. Prior to the contrary decision of the Oregon Supreme Court in *Hust* v. *Moore-McCormack Lines*, 176 Ore. 662, reversed, 328 U. S. 707, it was generally settled in the lower courts that whenever an agent would be independently liable to third persons for the negligence of its own employees in connection with a government vessel's operation, such third persons, if seamen on the vessel, might enforce such independent liability by suit under the Jones Act with the benefit of jury trial and the absence of the contributory negligence and assumption of risk defenses. See, *e.g.*, *Gay* v. *Pope & Talbot*, 183 Misc. 162, 167. This prior construction was apparently approved by a majority of this Court in *Caldarola* v. *Eckert*, 332 U. S. 155, 159.

petitioner for the negligence of the Government's master, officers, and crew (R. 538). The jury found a verdict for respondent for $100,000 on the first count, which alleged negligence; and found for the petitioner on the second, which was based on maintenance and cure (R. 557). Motions to dismiss the complaint, to set aside the verdict for respondent, and for a new trial were denied by the district court (R. 631) and on appeal the judgment was affirmed by the court below (R. 645).

In a unanimous opinion by Judge Augustus N. Hand, the Second Circuit held that under *Hust* v. *Moore-McCormack Lines*, 328 U. S. 707, petitioner was responsible for the negligence of the master and crew. It rejected the view that the holding in *Caldarola* v. *Eckert*, 332 U. S. 155, that the general agent was not an operating agent or owner *pro hac vice*, limited or overruled the *Hust* case, observing (R. 643-644), "such a conclusion would not seem to be open to us in view of the fact that the majority opinion in *Caldarola* expressly distinguished the right of a seaman under the Jones Act." It continued, "There may be possible conflicts between the *Hust* and the *Caldarola* decisions and some difficulty in reconciling the two, but for the reason we have given we regard the *Hust* case as still controlling upon us." The court declared that the *Hust* case held that prior to the passage of the Clarification Act the torts of the master and crew of a government-operated vessel "gave rise to a right of recovery against the general agent under the Jones Act" and that "the

theory of liability which it adopted seems to be equally applicable" to give such rights after that Act, and concluded (R. 644), "The question whether, and how far, such other rights exist is, as we have already said, a matter for determination by the Supreme Court in dealing with the scope of the *Hust* decision." The conflicting view of the Oregon Supreme Court in *Fink* v. *Shepard S. S. Co.*, 192 P. 2d 258, rehearing denied, 193 P. 2d 537, was expressly rejected.

SPECIFICATION OF ERRORS TO BE URGED

The United States Court of Appeals for the Second Circuit erred:

1. In holding that petitioner was liable to respondent for the negligence of his fellow officers who were neither subject to petitioner's orders nor doing work over which petitioner had any authority or control.

2. In failing to hold that in order to recover from petitioner in a statutory action under the Jones Act, respondent was required to establish negligence on the part of some person who was doing the work of petitioner or was subject to petitioner's authority or control.

3. In holding that because petitioner was the "employer" of an injured seaman, within the meaning of the Jones Act, and respondent could thus bring the statutory action against petitioner as such an "employer," petitioner was liable for the negligence of respondent's fellow officers in doing work of the United States over which petitioner had no authority or control.

4. In holding that respondent's right to bring the statutory action under the Jones Act against petitioner was conclusive of the different question of whether petitioner was liable for the negligence of respondent's fellow officers in doing work over which petitioner had no authority or control.

5. In holding that *Hust* v. *Moore-McCormack Lines*, 328 U. S. 707, was controlling in a case which arose subsequent to the enactment of the War Shipping Administration (Clarification) Act of March 24, 1943, 57 Stat. 45, 50, 50 U. S. C. App. 1291.

6. In failing to hold that, in a case arising subsequent to the effective date of the Clarification Act this suit is one against the United States to which the United States has not consented.

7. In failing to hold that *Brady* v. *Roosevelt S.S. Co.*, 317 U. S. 575, 584-585, and *Caldarola* v. *Eckert*, 332 U. S. 155, 159, were controlling in the absence of any evidence that petitioner had or exercised any possession or control of the Government's vessel.

8. In affirming the judgment of the district court holding petitioner liable to respondent.

REASONS FOR GRANTING THE WRIT

The issue presented by this case, in common with those of *Gaynor v. Agwilines, Inc.*, 1948 A. M. C. 1322 (C.C.A. 3), decided August 4, 1948, and *Fink* v. *Shepard S. S. Co.*, 192 P. 2d 258 (Ore.), rehearing denied, 193 P. 2d 537, is whether a civil service employee of the United States, injured while serving as a seaman on a government-operated vessel,

may recover for his injuries in a suit against the ship's husband or shoreside agent of the vessel who did not cause the injuries, who had no authority or control over the work in the course of which injuries occurred, and who owed no duty whatsoever to prevent the injury for which claim is made. The court below has held that he may. The Court of Appeals for the Third Circuit in the *Gaynor* case and the Supreme Court of Oregon in the *Fink* case have held that he may not. We submit that the court below has decided an important question in a manner which is not only in direct conflict with the *Gaynor* and *Fink* cases[6] but which is clearly wrong.

1. The case presents one aspect of the important question of the liability to third persons of private shipping companies employed by the Government as ships' husbands or general agents to attend to the accounting and certain other shoreside business of the government-owned merchant fleet during the wartime period of direct government operation.[7] In *Caldarola* v. *Eckert*, 332 U. S. 155, 158-160, this Court reaffirmed its previous decision

[6] We are advised that petitions for certiorari will be filed in the *Gaynor* and *Fink* cases. The Solicitor General is taking over the defense of those actions because they involve the same question as is here presented. It is our present intention to acquiesce in the granting of the petitions in those cases when filed.

[7] Justice Story in his treatise on *Agency* (9th Ed. § 35) says: "* * * generally, the person designated as ship's husband, * * * is understood to be the general agent of the owners, in regard to all the affairs of the ship in the home port. As such general agent, he is intrusted with authority to direct

in *Brady* v. *Roosevelt S. S. Co.*, 317 U. S. 575, 584-585, and held that the unquestioned right of third persons to maintain an action for maritime tort against a government agent for his independent faults did not impose upon a ship's husband or shoreside agent for the Government the duties of care to such third persons, which would have resulted if the agent had been given possession and control as operating agent of the Government's vessel.

In respect of all third persons, other than seamen, the federal courts of appeal have followed the *Caldarola* case with unanimity and held that the United States alone, and not the ship's husband, is liable for the negligence of the Government's master and crew in the navigation and management of its vessel. *Publicker Commercial Alcohol Co.* v. *American-Hawaiian S. S. Co.*, 165

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all proper repairs and equipments, and outfits for the ship; to hire the officers and crew; to enter into contracts for the freight or charter of the ship, if that is her usual employment; and to do all other acts necessary and proper to dispatch her for and on her intended voyage." See also *Mitchell* v. *Chambers*, 43 Mich. 150 (1880); *The Ole Oleson*, 20 Fed. 384 (C. C. E. D. Wis., 1884). General Order 12 of the War Shipping Administration provides: "A General Agent is one who takes care of the vessel's business on behalf of the War Shipping Administration, under a standard form of service agreement (GAA 4-4-42), appoints agents as directed by the War Shipping Administration to handle those functions which relate to the handling of the cargo and functions incidental thereto, and assumes those duties when not otherwise instructed, obtains all accounting for all revenue and expenses and accounts to the War Shipping Administration for all business of the vessel." 7 F. R. 4496, 46 C.F.R. Cum. Supp. § 306.3.

F. 2d 1002, 1006 (C.C.A. 3); *Dichmann, Wright & Pugh* v. *Weade*, 168 F. 2d 914 (C.C.A. 4); *McGowan* v. *J. H. Winchester & Co.*, 168 F. 2d 924 (C.C.A. 2); *Palardy* v. *American-Hawaiian S. S. Co.*, 1948 A.M.C. 1332 (C.C.A. 3), August 4, 1948.[8] But in respect of the Government's own seamen, the largest and most important single group of third persons, confusion and a conflict of decision have arisen in the lower courts which requires settlement by this Court.

In the present case the court below has held that such civil service employees, unlike all other third persons, may recover for the torts of their fellow government seamen by suit against the ship's husband or shoreside agent of the Government despite the fact that the agent's authority stops at the water's edge, that the United States carefully excluded him from possession and control of its vessels, and that the standard form of agency agreement may be searched from end to end without disclosing any assumption of liability on the part of the ship's husband to exercise care to prevent injuries of the type here involved. The decision below, we submit, is in fundamental disagreement with the *Caldarola* case and the decisions just cited, which unanimously hold that all other third per-

[8] The *Weade* case is now pending on a petition for a writ of certiorari, No. 179, this Term. We are informally advised that petitions will also be filed in the *McGowan* and *Palardy* cases. Owing to the circumstance that the decisions in those cases are not only clearly correct but also squarely within the *Caldarola* case, the Solicitor General has not taken over from the attorneys retained by the Government's underwriters the filing of briefs in opposition in those cases.

sons can recover only from the United States. As already noted, it is in direct conflict with the decisions of the Third Circuit in *Gaynor* v. *Aywilliues, Inc.*, and of the Supreme Court of Oregon in *Fink* v. *Shepard S. S. Co.*, both *supra*; those courts, on almost identical facts, held that the torts of the master and crew are attributable only to the United States, and, therefore, in cases after the enactment of the Clarification Act,[9] proof of actionable negligence of such fellow civil service seamen does not establish a right of recovery against the ship's husband or shoreside agent, but only against the United States.

2. The decision of the court below permitting recovery in a case arising subsequent to the Clarification Act is in admitted conflict (R. 644) with the decision of the Supreme Court of Oregon in *Fink* v. *Shepard S.S. Co., supra*, holding that the election, which this Court held was available to Hust under the retroactive provision of the Clarification Act, to enforce his Jones Act remedies by suit either against the United States pursuant to the Suits in Admiralty Act or against the agent pursuant to the statutory action (328 U. S. at 728, 730) is not available thereafter.

Absent such a right of election it is obvious that the present is a suit against the United States in a manner and form to which it has not consented. It was the intent of Congress, when it gave gov-

[9] War Shipping Administration (Clarification) Act of March 24, 1943, c. 26, 57 Stat. 45, as amended (50 U. S. C. App. 1291, *infra*, p. 19).

ernment seamen the rights of privately employed seamen, to restrict the enforcement of the rights thus given to suits in admiralty against the United States. Those rights were to be measured by those of seamen in private employment rather than by those of other employees in government service. But since the seamen in question were in fact employees in the civil service of the United States and not in private employment, the rights thus given must necessarily be enforced against their employer, the United States. Although general agents are not mentioned, the context no less than the legislative history excludes the notion that they were regarded by Congress as employers of the Government's civil service seamen and liable as such. Had Congress so regarded them, the Clarification Act would have been unnecessary, since as employees of the agent, government seamen, without any additional legislation, would have had the right to recover from the agent under the Jones Act, with the right to jury trial. See *Gaynor* v. *Agwilines, Inc.*, 76 F. Supp. 617, 620 (E. D. Pa.), affirmed, 1948 A.M.C. 1322, August 4, 1948 (C.C.A. 3). In the language of the *Fink* case, "It would have been wholly unnecessary to accord to seamen in private employment the rights of seamen in private employment" (192 P. 2d at 268).

3. Review of the judgment below is necessary not only because of the conflict of decision regarding an important issue, but also because, in our view, the lower court's decision is plainly wrong for failure to take account of this Court's decisions

in *Brady* v. *Roosevelt S.S. Co.*, 317 U. S. 575, 584-585; *Denton* v. *Yazoo & M. V. R.R. Co.*, 284 U. S. 305, 308-309, and *Caldarola* v. *Eckert*, 332 U. S. 155, 159.

We submit that under settled principles the vicarious liability of the ship's husband or shoreside business agent is limited to the torts of those persons who are doing the work of the agent in attending to such shoreside business and does not extend to the negligence of respondent's fellow civil service officers in doing work of the United States which was not subject to petitioner's control or direction. *Denton* v. *Yazoo & M.V.R.R. Co.*, *supra*; *Standard Oil Co.* v. *Anderson*, 212 U. S. 215, 220-225. There is no doubt that the ship's husband or shoreside business agent of a private principal under a similar form of agreement could not be held liable. The books can be searched in vain for even an attempt to impose the liability of an operating agent or owner *pro hac vice* on the ship's husband or shoreside agent for a private operating owner. The Third Circuit in *Gaynor* v. *Agwilines, Inc.*, applies those settled principles to a shoreside agent of the United States, holding that (1948 A.M.C., at p. 1331), "To the extent that the *Hust* case was authority to the contrary it must, therefore, be regarded as overruled by the *Caldarola* case."

This fundamental rule was ignored by the court below in abdicating its own power of decision and holding that since the majority opinion of this Court in *Caldarola* expressly reaffirmed the right

of a government seaman to maintain his action under the Jones Act, the possible conflicts between the *Hust* and *Caldarola* cases concerning whether a cause of action against the shoreside agent has been established constitutes a matter for determination by this Court (R. 644). But it seems too plain for argument that even if the ship's husband or shoreside business agent may, because of his activities in procuring them for employment by the Government, be deemed in some sense the "employer" of the seamen, which we must emphatically deny, still he is not in possession and control so as to be liable as owner *pro hac vice* of the vessel or employer *pro hac vice* of the civil service master, officers and crew through whom the United States mans, navigates and manages its vessel. Under settled principles, the loaned servant rule applies, and as the civil service crew were not doing the work of the shoreside agent, but exclusively the work of the United States, only the Government is liable for their negligence. *Denton* v. *Yazoo & M.V.R.R. Co.*, 284 U. S. 305, 308-309; *Norfolk & W. Ry. Co.* v. *Hall*, 57 F. 2d 1004, 1008 (C.C.A. 4); *McLamb* v. *E. I. DuPont De Nemours & Co.*, 79 F. 2d 966 (C. C. A. 4); *Hardy* v. *Shedden Co.*, 78 Fed. 610, 613 (C.C.A. 6); *Byrne* v. *Kansas City, Ft. S. & M. R. Co.*, 61 Fed. 605 (C.C.A. 6).

4. The importance of the present case extends far beyond the question of the injured seaman's forum or the extent of his recovery. As this Court recognized in the *Caldarola* case, the consequences to the national and international interests of the

United States of imposing the liability of an operating agent on the ship's husband or general agent employed only to attend to certain parts of the shoreside business of government-operated vessels would be far-reaching. "Serious issues affecting the immunity of Government vessels in foreign ports as well as immunity from regulation and taxation by local governments would needlessly be raised" (332 U. S. at 159). Thus, proceedings on the claim of the State of California for unemployment insurance taxes amounting to over thirteen million dollars are being held in abeyance pending this Court's decision on the question of the liability of government agents to seamen. These claims will proceed if the decision below is allowed to stand. And it must be expected that a like attitude will be taken by other local and foreign governments in respect of other matters of taxation and regulation, so that the Government's vessels will be denied all immunity.[10]

[10] Congress has already made special provision for unemployment compensation for War Shipping Administration seamen. 60 Stat. 982, 42 U.S.C. 1331-1336. Any recovery would therefore be a pure windfall to the state. The argument of the various taxing and regulating authorities appears to be that the right to treat government civil service seamen as employees of the ship's husband for the purposes of taxation and regulation is at least as great as for purposes of a government employee's recovery. Admittedly a ship's husband for a private shipping operator would not be liable. But if, where the United States is the principal, a different rule of liability to government seamen is to prevail despite their clear right to recover from the United States, the same can be argued in respect of taxation and regulation where, unless the agent can be held responsible, the Government and its vessels are entirely immune.

CONCLUSION

For the foregoing reasons, it is respectfully submitted that this petition for a writ of certiorari should be granted.

PHILIP B. PERLMAN,
Solicitor General.

OCTOBER, 1948.

APPENDIX

1. The War Shipping Administration (Clarification) Act of March 24, 1943, c. 26, 57 Stat. 45 (50 U. S. C. App. 1291), provides in pertinent part:

> (a) Officers and members of crews (hereinafter referred to as "seamen") employed on United States or foreign flag vessels as employees of the United States through the War Shipping Administration shall, with respect to (1) laws administered by the Public Health Service and the Social Security Act, as amended by subsection (b) (2) and (3) of this section; (2) death, injuries, illness, maintenance and cure, loss of effects, detention, or repatriation, or claims arising therefrom not covered by the foregoing clause (1); and (3) collection of wages and bonuses and making of allotments, have all of the rights, benefits, exemptions, privileges, and liabilities, under law applicable to citizens of the United States employed as seamen on privately owned and operated American vessels. Such seamen, because of the temporary wartime character of their employment by the War Shipping Administration, shall not be considered as officers or employees of the United States for the purposes of the United States Employees Compensation Act, as amended; the Civil Service Retirement Act, as amended; the Act of Congress approved March 7, 1942 (Public Law 490, Seventy-seventh Congress); or the Act en-

titled "An Act to provide benefits for the injury, disability, death, or detention of employees of contractors with the United States and certain other persons or reimbursement therefor", approved December 2, 1942 (Public Law 784, Seventy-seventh Congress). Claims arising under clause (1) hereof shall be enforced in the same manner as such claims would be enforced if the seaman were employed on a privately owned and operated American vessel. Any claim referred to in clause (2) or (3) hereof shall, if administratively disallowed in whole or in part, be enforced pursuant to the provisions of the Suits in Admiralty Act, notwithstanding the vessel on which the seaman is employed is not a merchant vessel within the meaning of such Act. Any claim, right, or cause of action of or in respect of any such seaman accruing on or after October 1, 1941, and prior to the date of enactment of this section may be enforced, and upon the election of the seaman or his surviving dependent or beneficiary, or his legal representative to do so shall be governed, as if this section had been in effect when such claim, right, or cause of action accrued, such election to be made in accordance with rules and regulations prescribed by the Administrator, War Shipping Administration. Rights of any seaman under the Social Security Act, as amended by subsection (b) (2) and (3), and claims therefor shall be governed solely by the provisions of such Act, so amended. When used in this subsection the term "administratively disallowed" means a denial of a written claim in accordance with rules or regulations prescribed by the Administrator, War Shipping Administration. When used in this subsection the terms "War Shipping Administration" and "Administrator, War Shipping Administration" shall be deemed to include the

> United States Maritime Commission with respect to the period beginning October 1, 1941, and ending February 11, 1942, and the term "seaman" shall be deemed to include any seaman employed as an employee of the United States through the War Shipping Administration on vessels made available to or subchartered to other agencies or departments of the United States.

2. The Jones Act of June 5, 1920, c. 250, § 33, 41 Stat. 1007 (46 U. S. C. 688), provides in pertinent part:

> Any seaman who shall suffer personal injury in the course of his employment may, at his election, maintain an action for damages at law, with the right of trial by jury, and in such action all statutes of the United States modifying or extending the common-law right or remedy in cases of personal injury to railway employees shall apply;***

3. The Employers' Liability Act of April 22, 1908, c. 149, § 1, 35 Stat. 65, as amended, 53 Stat. 1404 (45 U. S. C. 51), provides in pertinent part:

> Every common carrier by railroad *** shall be liable in damages to any person suffering injury while he is employed by such carrier *** for such injury or death resulting in whole or in part from the negligence of any of the officers, agents, or employees of such carrier, or by reason of any defect or insufficiency, due to its negligence, in its *** boats, wharves, or other equipment.

4. Revised Statutes 1753 (5 U. S. C. 631), authorizing the President to prescribe regulations regarding civil service employment, provides:

> The President is authorized to prescribe such regulations for the admission of persons into the civil service of the United States as may best promote the efficiency

thereof, and ascertain the fitness of each candidate in respect to age, health, character, knowledge, and ability for the branch of service into which he seeks to enter; and for this purpose he may employ suitable persons to conduct such inquiries, and may prescribe their duties, and establish regulations for the conduct of persons who may receive appointments in the civil service.

5. The Civil Service Rules and Schedules, as odified in Title 5, Code of Federal Regulations, . 48, and 1943 Cum. Supp. pp. 1441, 1488, provide n pertinent part as follows:

CIVIL SERVICE RULE II

SECTION 2.1. *Extent of the classified service.*—The classified service shall include all persons who have been heretofore or may hereafter be given a competitive status in the classified civil service with or without competitive examination, by legislative enactment, or under the civil service rules promulgated by the President, or by Executive orders covering groups of employees with their positions into the competitive classified service or authorizing the appointment of individuals to positions within such service. It shall include all positions now existing or hereafter created by legislative or Executive action, of whatever function or designation, whether compensated by a fixed salary or otherwise, unless excepted from classification by specific affirmative legislative or Executive action. No right of classification shall accrue to persons whose appointment or assignment to classified duties is in violation of the civil-service rules. [E. O. 7915, June 24, 1938, effective Feb. 1, 1939; 3 F. R. 1519.]

* * * * *

SECTION 2.3. *Exceptions from classification.*—(a) Positions in Parts 50 and 51 are excepted from the classified service.

(b) Appointments to the excepted positions named in Part 50 may be made without examination or upon noncompetitive examination. * * * [E. O. 7915, June 24, 1938, effective Feb. 1, 1939, as amended by E. O. 8083, Apr. 10, 1939, effective May 1, 1939; 3 F. R. 1519, 4 F. R. 1577.]

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SECTION 50.0. *Certain positions excepted from examination under § 2.3.*—The positions designated in this part are excepted from examination, but not more than one position shall be treated as excepted under any title unless a different number of positions be indicated (Rule XVI, sec. 1, E. O. 209, Mar. 20, 1903, 5 C. F. R. 16.1) [Regs. CSC, as of June 1, 1938].

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§ 50.21. *United States Maritime Commission.*—(a) All positions on Government-owned ships operated by the United States Maritime Commission [E. O. 9004, Dec. 30, 1941; 7 F. R. 2].

NOTE: These positions were transferred to the War Shipping Administration by E. O. 9054; 7 F. R. 837.]

6. War Shipping Administration Operations Regulation No. 12, Supplement 1, provides as follows:

OPERATIONS REGULATION No. 12
SUPPLEMENT No. 1, OCTOBER 7 1944

Pertaining to All Vessels Owned by or Under Charter to the War Shipping Administration (Dry Cargo and Passenger Vessels, Tankers, Colliers and Small Craft)

Subject: Employee Status of Certain Personnel Employed by Agents.

This Supplement No. 1 to Operations Regulation No. 12 is issued for the purpose of clarifying the employment status of certain personnel employed by Agents in the conduct of the business of vessels or their cargo under the GAA, TCA, and BA agreements.

It is clear from the provisions of Article 3A (d) of the General Agency Service Agreement that Masters and crew members are employees of the United States, but no specific provision is made in the GAA, TCA, or BA agreements as to whether other personnel are employees of the United States or of the Agents, General Agents, or Berth Agents. Reading the provisions of the agreements as a whole it is also clear that, except for the Master, officers, and crew, persons employed by an Agent, General Agent, or Berth Agent are employees of such Agents and not of the United States.

1. Excepting only additions to the vessel's crew and employees of independent contractors, personnel employed by General Agents pursuant to Operations Regulation No. 12 are employees of the General Agent and not of the United States. Other personnel directly employed by Agents, General Agents, and Berth Agents, (and their Sub-Agents) to perform work in connection with vessels or their cargo and special work incident thereto, including shore gangs, checkers, tallymen, watchmen, guards, coal trimmers, and other extra labor, but excluding relief officers, shore relief, and crew members, are employees of such Agents and not of the United States.

2. The direct labor costs of the employees of Agents referred to in paragraph 1 shall

be paid for from the corporate funds of the Agents, and, in accordance with Article 7 of the service agreements, the Agent may reimburse himself for such expenses from the special bank account established for use in connection with the service agreements. Such costs shall include, but without limitation, taxes (employer's contributions only) payable pursuant to the Federal Insurance Contributions Act (OAB tax) and to any state or federal unemployment insurance law in respect of the direct labor to which the same may be applicable; and premiums on workmen's compensation insurance carried pursuant to the Federal Longshoremen's and Harbor Workmen's Compensation Act and any state workmen's compensation laws in respect of the direct labor to which the same may be applicable. Such costs shall not include compensation for supervisory services or overhead of the Agent.

3. With respect to the work performed by the employees of Agents referred to in paragraph 1, the Agent shall be indemnified to the full extent provided under the applicable service agreement, regardless of the fact that the employees in question are employees of the Agent and not of the United States.

4. The interpretation and instructions contained in this Regulation need not be applied retroactively by the Agents.

(Sgd.) G. H. Helmbold,

G. H. HELMBOLD,

Assistant Deputy Administrator for Ship Operations.

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